Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

No. 04 184

IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

APPENDIX, volume 1

ERIC A. SAMLER
Counsel of Record for Petitioner
SAMLER & WHITSON, P.C.
1776 Lincoln Street,
Suite 1010
Denver, Colorado 80203
303-670-0575

TABLE OF CONTENTS

People ex. rel. A.J.C., 88 P.3d.599 (Colo 2004) 1

January 3, 2004 Order of Jefferson County District Court Dismissing Custody Petition 94

January 13, 2004 Order of Jefferson County District Court Dismissing Custody Petition 97

October 15, 2003 Judgment of Dismissal of Petition of Adoption entered by Circuit Court of St. Charles County Missouri 100

January 2, 2004 Order of Circuit Court St. Charles County Missouri denying Respondent's Motion to Vacate Judgment and awarding custody of A.J.C. to Petitioner 111

Order of Colorado Supreme Court denying Petition for Rehearing 116

U.S. Const. Art. IV sec 1. 119

U.S. Const. Art. VI sec. 2. 120

28 U.S.C. sec. 1738A
(Parental Kidnaping Prevention Act) 121

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203

Case No. 04 SA 18

ORIGINAL PROCEEDING PURSUANT TO
C.A.R. 21
JEFFERSON COUNTY DISTRICT COURT,
CASE 03DR2893

In re:

THE PEOPLE OF THE STATE OF COLORADO,

In the interest of:

Minor Child :

A. J. C.:

DOB: 04/18/03

Petitioners:

G. A. L. and V. K. L.,

and concerning :

Respondents:

C.M.C. and D. C.

RULE MADE ABSOLUTE
EN BANC

April 12, 2004

Beltz & West, P.C.
W. Thomas Beltz
Daniel A. West
Colorado Springs, Colorado
Attorneys for Petitioners

Samler & Whitson, P.C.
Eric A. Samler
Denver, Colorado
Virginia L. Frank
Evergreen, Colorado

Attorneys for Respondents

JUSTICE KOURLIS delivered the Opinion of the Court.
JUSTICE COATS dissents

I. INTRODUCTION

This is an original proceeding under C.A.R. 21 in which the Petitioners, G.A.L. and V.K.L., seek review of an order of the Jefferson County District Court (the district court) dismissing their Verified Petition for Allocation of Parental Responsibilities, Writ of Habeas Corpus, and subsequent Order denying the Petitioners post-judgment relief.

Specifically, the Petitioners ask this court to reverse those orders and remand the matter back to the district court for an evidentiary hearing on their Verified Petition for Allocation of Parental Responsibilities. We issued a Rule to Show Cause on January 20, 2004, and ordered expedited briefing.

This case involves a failed adoption. The child, A.J.C., was born in Missouri on April 18, 2003. Immediately after his birth, the natural mother consented to the placement of the child for adoption with a Colorado couple, the Petitioners, who returned here with him and have remained here. In October of 2003, the Missouri court dismissed the adoption petition filed by the Petitioners in Missouri because the natural mother had, by that time, withdrawn her consent. The Missouri court eventually ordered that the Petitioners return the child to the mother. The Petitioners commenced a

proceeding in Colorado seeking to establish an ongoing relationship with the child, even though that child was no longer available for adoption.

Had the child been born in Colorado, our statutes and case law would direct the courts of this state to entertain the Petitioner's Petition for Allocation of Parental Responsibilities, despite the failed adoption. That custody determination, like all custody determinations, would be guided by the best interests of the child and a court would take evidence to that effect.

What we consider here is whether, because the child was born in Missouri, spent two days of his life there and was the subject of a Missouri adoption proceeding, the outcome should be a different one. To resolve that question, we look not only to Colorado's and Missouri's internal law, but also to the laws that govern interstate disputes of this

nature. Although we uncover more questions than answers in our survey of this body of law, we ultimately conclude that there is nothing about the interstate nature of this dispute that would demand that Colorado decline to treat this child as we would treat a child born within our borders.

We organize our analysis in this opinion by first outlining Colorado's internal law, then summarizing the law in Missouri that would appear to apply. Colorado law would clearly direct the court to engage in a "best interests" analysis concerning the placement of A.J.C. Nothing in Missouri law controverts the undertaking of that inquiry, and indeed, Missouri courts themselves have undertaken similar inquiries in other cases.

We then look to the laws in both Colorado and Missouri that bear upon the resolution of interstate disputes of this nature. Colorado previously

determined its jurisdiction in interstate custody disputes by reference to the Uniform Child Custody Jurisdiction Act (UCCJA), section 14-13-101, et seq., 5 C.R.S. (1999), which is no longer in place in Colorado, but which is still in place in Missouri. Mo. Rev. Stat. 452.440 to 452.550 (2003). When it was in place, courts of this state construed the UCCJA to apply to custody issues arising out of failed adoptions, and Missouri's courts seem to concur. Hence, if we look to any continuing applicability of the UCCJA by virtue of its force in Missouri, Colorado would be entitled to exercise jurisdiction over this dispute as the home state of the child because the child has resided here for all of his young life.

However, Colorado has repealed the UCCJA, and enacted the more modern Uniform Child-custody Jurisdiction and Enforcement Act (UCCJEA). § 14-

13-101, et seq., 5 C.R.S. (2003). We conclude that the UCCJEA does not apply to failed adoption proceedings, by specific language of the statute. Hence, the UCCJEA offers us little assistance in this controversy. We do note that the exclusion of adoptions from the UCCJEA was made in reliance upon an expectation that states will adopt the Uniform Adoption Act (UAA). Unif. Adoption Act, 9 U.L.A. 16, 16-132 (1994). Although neither Colorado nor Missouri have enacted the UAA, the drafters of the UCCJEA believed the UAA was an important and appropriate outline of law governing adoptions. Thus, we review its terms and conclude that it, too, would direct Colorado to proceed with a best interests inquiry concerning this child.

Both Colorado and Missouri have adopted the Interstate Compact on the Placement of Children (ICPC or the "Compact"). §§ 24-60-1801 to 24-60-

1803, 7B C.R.S. (2003); Mo. Ann. Stat. § 210.620 (2003). Under that Compact, the sending agency in Missouri is empowered to cause the return of the child to that state. By virtue of Missouri law, we construe the sending agency to mean the adoption intermediary here, who has declined to request that the child be returned to Missouri.

Accordingly, reviewing all potentially applicable laws, we find nothing that would mandate that Colorado decline to engage in the inquiry that it would afford to a Colorado-born child: namely – assessing the Petitioners' and the natural mother's claims in the context of the child's own best interests. We conclude that the district court erred in determining that it was without jurisdiction to hear the Petitioners' case.

Our decision today comports with the

"an object that 'belongs' to a parent or would-be parent and has to be shifted back and forth in the event 'ownership' rights are changed or reinstated." Unif. Adoption Act (1994) § 2-408, cmt., 9 U.L.A. 62 (1999). Rather, A.J.C. is a party to this proceeding and, as such, has the right to have his best interests heard and determined by the court, independent of the legal rights of either his biological mother or the Petitioners. We now make the Rule absolute and remand the case to the district court for further proceedings consistent with this opinion.

II. FACTS AND PROCEDURAL HISTORY

This case concerns a child, A.J.C., who was born in Missouri on April 18, 2003, to C.M.C. (Mother) and D.C. (Father).[1] On April 19, 2003,

[1] The facts cited herein are taken from the briefs and supporting documents submitted by the parties. The records from earlier proceedings in the Missouri circuit court are not before us.

Appointment of Power of Attorney for Care of Child. This agreement transferred the physical and temporary legal custody of A.J.C. from Mother to the Petitioners pending a final adoption. The Petitioners are both residents of Colorado.

On April 21, 2003, Mother signed a Consent to Termination of Parental Rights and Consent to Adoption, which was filed with the Circuit Court of St. Charles County, Missouri (the "circuit court"). That same day, the Petitioners filed both a Petition for Termination of Parental Rights and Transfer of Legal Custody and a Petition for Adoption in the circuit court. Additionally, the Petitioners filed a Motion for an Emergency Order for Transfer of Custody. On April 21, 2003, the circuit court entered an Order approving preliminary placement of A.J.C. with the prospective adoptive

parents, the Petitioners. The circuit court noted in that Order that it was approving preliminary placement only and that it retained jurisdiction to conduct a formal hearing regarding the termination of Mother's parental rights, the transfer of legal custody of A.J.C. to the Petitioners, and ultimate approval of the Petition for Adoption. At that point, two days after the baby's birth, the Petitioners obtained physical custody of A.J.C. and returned with him to Colorado.[2]

On May 15, 2003, the circuit court entered an Order stating that it could not approve the Consent to Termination of Parental Rights and Consent to Adoption because "[s]aid consent did not identify the

---

[2] We note that we have no record of a guardian ad litem advocating on behalf of A.J.C.'s interests in the adoption proceedings, although Missouri law requires the appointment of such a person. Pursuant to Mo. Rev. Stat. § 453.025 (2003), a court "shall, in all cases where the person sought to be adopted is under eighteen years of age, appoint a guardian ad litem . . . to represent the person sought to be adopted."

name of any possible father of the child," as required by Missouri law. After this Order was entered, Mother apparently changed her mind about the adoption and on July 25, 2003, Mother filed a Motion to Withdraw and Revoke Consent to Adoption with the circuit court. On August 22, 2003, the circuit court entered a Judgment and Order granting Mother's motion withdrawing her consent to the termination of her parental rights and consent to the adoption.

On September 26, 2003, Mother filed a Motion to Dismiss the Petitioners' Petition for Adoption. Mother asserted that she had effectively withdrawn her consent to the adoption, thereby terminating the adoption proceedings. As a result, Mother argued that custody of A.J.C. should revert to her.

On October 15, 2003, some six months after Petitioners had obtained custody of A.J.C., the

circuit court entered a Judgment of Dismissal of the Petitioners' Petition of Adoption. The circuit court noted that Mother had withdrawn her consent to the termination of her parental rights and consent to the adoption before such consent was reviewed and approved by the court.[3] Furthermore, the circuit court found that no circumstances existed that would allow the adoption to proceed without consent.[4] Thus, the circuit court granted Mother's Motion to Dismiss and ordered that physical custody of A.J.C. be restored to Mother forthwith.

On November 3, 2003, the Petitioners filed a Motion to Vacate the circuit court's Judgment of Dismissal of Petition of Adoption entered on October 15, 2003. On December 5, 2003, the circuit court

---

[3] Mo. Rev. Stat. § 453.030.7 (2003) provides that written consent to adoption "may be withdrawn anytime until it has been reviewed and accepted by a judge."

[4] Mo. Rev. Stat. § 453.040 (2003) enumerates certain circumstances where the consent of biological parents to the adoption of a child is not required.

held a hearing on the Petitioners' Motion to Vacate.[5] On January 2, 2004, the circuit court denied the Petitioners' Motion to Vacate. The circuit court determined that, as a matter of law, Mother effectively withdrew her consent to the termination of her parental rights and to the adoption of A.J.C. by the Petitioners. Furthermore, the circuit court concluded that Mother had not abandoned A.J.C.[6] The circuit court held that "[t]he consequence of that determination is that the child shall be returned to Mother's Custody." However, the circuit court specifically noted that it was not determining custody as between Mother and Father, noting that such a determination "must necessarily await

[5] A transcript of that proceeding is not before this court.
[6] The Petitioners alleged that Mother had abandoned A.J.C. A finding of abandonment would have obviated the need for valid consent to the adoption by Mother and Father pursuant to Mo. Rev. Stat. § 453.040.7.

another proceeding."[7]

On October 31, 2003, two weeks after the circuit court ordered that physical custody of A.J.C. be returned to Mother, and four days before the Petitioners filed their Motion to Vacate the Circuit Court Order awarding custody to Mother, Petitioners

---

[7] At the present time, there is an appeal pending in the Missouri Court of Appeals. This appeal involves the dismissal of the Petitioner's Petition for Adoption. Specifically, the appeal addresses whether Mother's withdrawal of her consent to the adoption was valid. However, this appeal does not change the focus of our analysis. To the contrary, this appeal supports the notion that the failed adoption proceedings, to which we are according full faith and credit, are separate and distinct from the issue we address today, namely whether Colorado has jurisdiction to determine who should have custody of A.J.C. Stated differently, this is not a case where the Petitioners seek to re-litigate in Colorado the unfavorable result reached in the Missouri adoption proceedings. Rather, the Petitioners seek an independent custody determination that reflects the best interests of A.J.C. For a discussion of the differences between adoption proceedings and custody proceedings, see Herma H. Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA, is the Answer, 84 Cal.L.Rev. 703, 728 (1996) (Unlike a custody determination that "commits the court to a supervision of the parent-child relationship" until the child "attains majority or becomes emancipated," adoption proceedings "sever the parental ties created by birth" and "replace them with legal ties that will serve as the foundation for a new parent-child relationship.").

filed a Verified Petition for Allocation of Parental Responsibilities with the district court in Colorado. On November 3, 2003, Mother filed a Petition for Writ of Habeas Corpus with the district court in Colorado. One month later, on December 3, 2003, Mother filed an Answer to the Petitioners' Petition as well as a Motion to Dismiss the Petition.

On January 3, 2004, the district court entered a Writ of Habeas Corpus commanding the Petitioners to return the custody of A.J.C. to Mother. That same day, the district court entered an Order dismissing the Petitioners' Verified Petition for Allocation of Parental Responsibilities. The district court found that an initial custody determination regarding A.J.C. had been made by the circuit court in Missouri. As a result, the district court determined that it lacked jurisdiction to entertain

the Petitioners' Petition.[8]

On January 8, 2004, the Petitioners filed a Motion for Post-Trial Relief in the district court. The district court denied that motion in an Order dated January 13, 2004.[9] The Petitioners filed a Petition for Rule to Show Cause pursuant to C.A.R. 21 with

---

[8] It should be noted that the district court did not decide, as a matter of judicial discretion, to decline jurisdiction over the Petitioners' Petition. Rather, the district court determined that, as a matter of law, it lacked jurisdiction. During a January 16, 2004, hearing, District Court Judge Stephen Munsinger stated:

> "I'd like nothing better than to have the child remain here in Colorado, and have jurisdiction over the child, but my understanding of the procedure is that Missouri has primary jurisdiction . . . . If I had jurisdiction I'd be the first one to exercise it . . . ."

[9] In his Order, Judge Stephen Munsinger referenced a December 4, 2003, telephone conference between himself and Judge Briscoe, the Missouri circuit court Judge. The court has a transcript of that conference as part of the record in this proceeding. In essence, the conversation between Judges Munsinger and Briscoe consisted of a discussion about the proceedings in Missouri and a conclusion by Judge Munsinger that Judge Briscoe's Order dismissing the Petitioners' Petition for Adoption divested the district court in Colorado of any jurisdiction over the custody of A.J.C.

this court on January 20, 2004.[10] We issued a Rule to Show Cause and now make that Rule absolute.

III. OVERVIEW OF ANALYSIS

The issue before us in this original proceeding is whether the district court had jurisdiction to consider the Petitioners' Verified Petition for Allocation of Parental Responsibilities. Despite the procedural complexity of the case, the ultimate issue is quite simple and quite compelling. Specifically, we must determine whether a court in Colorado has jurisdiction to consider placement of a child when that child has lived in Colorado with prospective adoptive parents in excess of six months and has been determined by another state to be no longer available for adoption.

---

[10] The issue presented for review is "whether or not the Jefferson County District Court erred in dismissing Petitioners' Verified Petition for Allocation of Parental Responsibilities and granting the Writ of Habeas Corpus."

It is undisputed that the circuit court's order dismissing the Petition for Adoption is entitled to full faith and credit. Indeed, the Petitioners do not seek to re-litigate those adoption proceedings in Colorado. However, the Petitioners do maintain that they have the right to seek custody of A.J.C. notwithstanding the failed adoption in Missouri. Hence, we must determine whether the circuit court's order restoring custody of A.J.C. to Mother as a result of the failed adoption divests Colorado of jurisdiction to determine who should have custody of A.J.C. based on his best interests. To answer this question, we review the internal law in Colorado and Missouri and the applicable laws in both states addressing jurisdiction in interstate disputes of this nature.

IV. INTERNAL LAW

A. Colorado Law

Initially, we note that had the failed adoption proceedings taken place exclusively in Colorado, there would be no question that the district court would have jurisdiction to entertain the Petitioners' Verified Petition for Allocation of Parental Responsibilities.

In 1995, this court held that non-parents with physical custody of a child in contemplation of future relinquishment and adoption proceedings had standing under the Uniform Dissolution of Marriage Act (UDMA), section 14-10-101, et seq., 5 C.R.S. (2003), to seek custody of the child after the adoption failed. In re Custody of C.C.R.S., 892 P.2d 246, 253 (Colo. 1995) (non-parents who had physical possession and control of a child for six months before the filing of their custody petition had

standing under either subsection (1)(b) or (1)(c) of section 14-10-123, 5 C.R.S. (2003) of the UDMA. Most importantly, for purposes of the case before us today, we also held that the revocation of a biological parent's consent to the termination of parental responsibilities and adoption did not give the biological parent an automatic statutory right to the return of her child. C.C.R.S., 892 P.2d at 254. Rather, we determined that "the prospective adoption proceedings turned into a custodial dispute under the UDMA, which did not involve the termination of parental rights." Id.

Additionally, Colorado's statutes governing adoptions provide that when the relinquishment of a parent-child legal relationship is revoked, "the court shall dismiss any proceeding for adoption and shall provide for the care and custody of the child

according to the child's best interests."[11] § 19-5-104(8), 6 C.R.S. (2003) (emphasis added).

Hence, in Colorado, by operation of statute and case law, when prospective adoptive parents have custody of a child and the adoption fails, those individuals nonetheless have a right to ask a court to determine whether they may be afforded some ongoing rights and responsibilities in service of the best interests of the child. Those proceedings would, under present law, be governed by the UDMA and, accordingly, the "best interests of the child standard" would apply at that point. C.C.R.S., 892 P.2d at 257-58.

This failed adoption proceeding occurred in Missouri, not Colorado. Therefore, it falls to us to determine whether the interstate nature of this case

[11] Although the revocation of a relinquishment of parental rights is not the precise factual circumstance we face to today, this statutory provision is certainly instructive and persuasive as to the legislature's intent.

causes us to change the result reached in C.C.R.S.

B. Missouri Law

Missouri, like Colorado, has recognized that in certain situations, a failed adoption does not automatically result in the custody of a child being restored to the natural parent(s). See In re Baby Girl, 850 S.W.2d 64 (Mo. 1993) (where trial court considered the validity of a biological mother's consent to adoption, but failed to inquire into the best interests of the child, as required by statute, the case was remanded for further proceedings). Although Baby Girl was based on a specific statute requiring a court to inquire into the best interests of the child when a child is unlawfully removed from the state, we take from that case the principle that failed adoption proceedings do not in all cases require custody to be returned to the biological parent(s).

Indeed, Missouri, like Colorado, emphasizes that the overarching goal in all adoption and custody proceedings is the best interests of the child. See Mo. Rev. Stat. § 453.005 (2003) (The statutory provisions governing adoption and foster care "shall be construed so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home."); Mo. Rev. Stat. § 452.375.2 (2003) ("The court shall determine custody in accordance with the best interests of the child."); Shepler v. Sayres, 372 S.W.2d 87, 90-91 (Mo. 1963) (When adjudicating child custody questions, "it may be said that the prime consideration of the courts, and the ultimately determinative factor in all such cases, is that of the welfare and best interests of the children involved."); In re K.K.M., 647 S.W.2d 886, 892 (Mo. Ct. App. 1983) ("The polestar guiding the resolution of

custody disputes is the best interests of the child."); see also In re Neusche, 398 S.W.2d 453, 457 (Mo. Ct. App. 1966) (holding that "the welfare of the child is the primary and paramount consideration in an adoption or custody proceeding, the wishes of the nature [sic] mother and of the petitioners being secondary and subservient thereto").

Missouri law also requires the court to appoint a guardian ad litem to represent a minor child such as A.J.C. who is the subject of an adoption proceeding, presumably in order to convey to the court what the best interests of the child are. Mo. Rev. Stat. § 453.025 (2003) (A court "shall, in all cases where the person sought to be adopted is under eighteen years of age, appoint a guardian ad litem . . . to represent the person sought to be adopted."). Thus, we conclude that Missouri's law, like Colorado's, supports the proposition that custody

determinations, even after a failed adoption, must take into account the best interests of the child.

V. Applicable Interstate Laws

Because interstate child custody decrees are a fact of modern life, various state and national laws have been passed that address enforcement of those decrees. State legislatures around the country have adopted, with some variation, the Uniform Child Custody Jurisdiction Act (UCCJA), see, e.g., Mo. Rev. Stat. §§ 452.440 through 452.550, and its successor, the Uniform Child-custody Jurisdiction and Enforcement Act (UCCJEA), which appears in the Colorado statutes at section 14-13-101, et seq., 5 C.R.S. (2003).

Prior to 2000, Colorado relied upon the UCCJA to determine whether a court of this state had jurisdiction to enter an initial custody order or to modify a pre-existing custody order entered by

another state. However, during the 2000 legislative session, our General Assembly repealed the UCCJA and enacted the UCCJEA, which significantly altered the jurisdictional requirements in interstate custody disputes. Ch. 320, secs. 1-2, § 14-13-101, et seq., 2000 Colo. Sess. Laws 1519, 1519-37. Missouri continues to operate under the old framework of the UCCJA, and has not adopted the UCCJEA. See Mo. Rev. Stat. §§ 452.440-550 (2003).

The United States Congress has recognized the national importance of interstate child placement issues by adoption of the Parental Kidnapping Prevention Act of 1980 (PKPA), § 8, 28 U.S.C.A., § 1738A (2003), which requires the courts of every state to enforce a child custody determination of a sister state made consistently with the provisions of that Act.

Lastly, all fifty states, including Missouri and

Colorado, have adopted the Interstate Compact on the Placement of Children (ICPC). See 2 Am. Jur. 2d Adoption § 28 (2003). The ICPC appears in the Colorado statutes at sections 24-60-1801 through 24-60-1803, 7B C.R.S. (2003).

A. The UCCJA and UCCJEA

Missouri relies upon the UCCJA; Colorado upon the UCCJEA. The UCCJA, when it was in place in Colorado, was held to apply to failed adoptions. Missouri case law appears to accord with that conclusion. The UCCJEA, on the other hand, does not apply to adoption proceedings. In light of the significant differences between the UCCJA and the UCCJEA, we examine each in turn.

i. Jurisdiction Under the UCCJA

The UCCJA is jurisdictional legislation that was developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in

1968, and was adopted in Colorado in 1973, nearly verbatim. L.G v. People, 890 P.2d 647, 655 (Colo. 1995).

The UCCJA applies to "custody determinations" made in "custody proceedings." See § 14-13-103(2) and (3), 6B C.R.S. (1999); L.G., 890 P.2d at 657. Although the term "adoption" does not appear in the UCCJA's definition of child-custody determinations or child-custody proceedings, courts of this state construed the UCCJA to include adoption proceedings. See In re Custody of K.R., 897 P.2d 896, 899-900 (Colo. App. 1995) (Adoption proceedings are "custody proceedings" within the meaning of the UCCJA, and therefore its jurisdictional prerequisites apply to custody determinations following a failed adoption.).[12]

[12] Although courts in other jurisdictions have similarly concluded that the UCCJA applies to adoption proceedings, this conclusion is by no means unanimous. See In re Adoption of Asente, 734 N.E.2d 1224, 1231

Missouri appears to be among the states that would similarly apply the UCCJA to adoption proceedings. See In re T.C.M., 651 S.W.2d 525, 528 (Mo. Ct. App. 1983) (Assuming the UCCJA applied to adoptions, Missouri, as the home state of the child, could take jurisdiction over a proceeding in which the prospective adoptive parents resided in Missouri, although the contested adoption proceeding had occurred in North Carolina.).[13]

(Ohio 2000) (recognizing that there is disagreement as to whether the UCCJA should apply to adoption proceedings); see also Johnson v. Capps, 415 N.E.2d 108, 110 (Ind. Ct. App. 1981) (Adoption proceedings are brought for the purpose of terminating all parental rights of the biological mother, not to establish or modify a custody decree, and therefore adoption proceedings are not governed by the UCCJA.); see also Herma H. Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA, is the Answer, 84 Cal.L.Rev. 703 (1996) (arguing against the applicability of the UCCJA to adoption proceedings).

[13] In In re Baby Girl, the Missouri court of appeals held that the UCCJA did not apply to an adoption proceeding. 1992 WL 139363 *6 (Mo. Ct. App. 1992) (not published by virtue of transfer to the Missouri Supreme Court). The Supreme Court reversed on other grounds. See In re Baby Girl 850 S.W.2d 64 (Mo. 1993).

Under the UCCJA, courts of this state employed a two-part test to determine whether jurisdiction in a custody matter is proper. L.G., 890 P.2d at 656 (citing Barden v. Blau, 712 P.2d 481, 484 (Colo. 1986)). First, a court was required to determine whether, as a threshold matter, it could properly exercise jurisdiction over a case pursuant to section 14-13-104 of the UCCJA. L.G., 890 P.2d at 656. If the statute conferred jurisdiction, the court was nevertheless required to determine whether, under other provisions of the UCCJA, the court ought to exercise that jurisdiction. Id.

Section 14-13-104(1)(a)-(c), 5 C.R.S. (2003) of the UCCJA provided three general bases for an assertion of jurisdiction over custody proceedings: (1) if the state was the child's home state,[14] and one

[14] Section 14-13-103(5), 5 C.R.S. (1999), defined "home state" as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six

parent or person acting as a parent continued to live in the state even though the child did not; (2) if the child had significant connections with the state so that it was in the child's best interests for that state to assume jurisdiction; and (3) if there was an emergent situation requiring the protection of the child and the child was physically present in the state. L.G., 890 P.2d at 658. Section 14-13-104(1)(d) provided one final avenue for a court to assume jurisdiction. Under that provision, Colorado could assume jurisdiction over the custody proceedings if it appeared that no other state would have jurisdiction under any of the other provisions contained in section 14-13-104. Id.

---

consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned." See also § 14-13-104(1)(a), 5 C.R.S. (1999) ("A court of this state . . . has jurisdiction to make a child custody determination by initial or modification decree if . . . [t]his state is the home state of the child at the time of commencement of the proceeding.")

Although the UCCJA identified several different bases for jurisdiction, it provided no clear means of assigning priority among them. Rather, it allowed courts to exercise jurisdiction if any of the jurisdictional requirements within the UCCJA were met. This resulted in the possibility, and indeed the likelihood, that more than one state could assert jurisdiction. See Kathleen A. Hogan, Custody Jurisdiction, 26-WTR Fam. Advoc. 22, 23 (2004). For precisely this reason, after a court determined it had jurisdiction, it was required to take the additional step of determining whether it ought to exercise that jurisdiction in light of other provisions of the UCCJA.

Most importantly, if a court in this state wanted to modify another state's initial custody decree, it was required to satisfy section 14-13-115, 5 C.R.S. (1999), of the UCCJA. That provision

provided that

> [i]f a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction . . . or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.

Thus, once an initial custody decree was entered in another state, the courts of this state could only exercise jurisdiction if the other court lacked jurisdiction when the decree was entered or somehow declined to exercise jurisdiction.

In this case, were we to apply the UCCJA, Colorado would clearly have jurisdiction to entertain the Petitioners' Verified Petition for Allocation of Parental Responsibilities. At the point at which the Petition was filed, A.J.C. had lived in Colorado for at

least six consecutive months. Therefore, Colorado is the home state of A.J.C. under the UCCJA. Additionally, the Petitioners fall within the statutory definition of persons "acting as a parent" because they have had physical custody of A.J.C. since his birth and have exercised all parental rights and responsibilities. However, our conclusion that Colorado is the home state of A.J.C., by itself, would be insufficient to confer jurisdiction upon Colorado under the UCCJA. Rather, we would also be required to consider whether Colorado, in light of other provisions of the UCCJA, should exercise jurisdiction in this case.

Viewing Missouri's order as akin to an initial custody decree, we would be bound under the UCCJA to examine the provisions of section 14-13-115 to determine whether we had jurisdiction to modify that decree. The relevant inquiry for

purposes of this case would be whether Missouri had declined to exercise its jurisdiction by virtue of having failed to determine custody of A.J.C. according to his best interests.

Other jurisdictions relying upon the UCCJA have examined that precise dilemma. Some courts have recognized the need to accord full faith and credit to custody decrees of other states. Others have concluded that the failure to make custody determinations according to the best interests of the child may be construed as a declination of jurisdiction, thereby enabling the state where the child resides to exercise jurisdiction.

The two lead cases around the country on opposing sides of this issue are a New Jersey Supreme Court case and a Michigan Supreme Court case. In E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982), cert. denied, 459 U.S. 1210 (1983), the New Jersey

Supreme Court held that New Jersey was not obligated under either the Parental Kidnapping Prevention Act of 1980 (PKPA), § 28 U.S.C. 1738A (2004), or the UCCJEA to enforce a custody determination made by another state following a failed adoption where the other state did not consider the best interests of the child.

In E.E.B., both the adoptive parents and the natural mother resided in Ohio at the time mother surrendered the child to the state and adoption had been effectuated by the Ohio courts. 446 A.2d at 873. Shortly after the adoption, the mother revoked her consent. Id. To regain custody of the child, she initiated a habeas corpus action in the Ohio courts, ultimately appealing to the Ohio Supreme Court. Id. at 874. The Ohio Supreme Court concluded that the natural mother had effectively revoked her consent and it determined that the right to custody belonged

with the natural mother and, without conducting a best interests hearing, ordered the return of the child to her. Id. at 873-74. During the appeals process, however, the adoptive parents had moved with the child to New Jersey. Id. at 874. The parents then instituted an action for custody in the courts of New Jersey. Id. at 874.

In approving a New Jersey court's exercise of jurisdiction over the case despite the prior custody determination made in Ohio, the New Jersey Supreme Court held that:

> Ohio's failure to conduct a best interest hearing constitutes a refusal to exercise jurisdiction under 28 U.S.C.A. § 1738A(f)(2). Under PKPA, therefore, New Jersey is free to modify the Ohio decree. This result comports with the congressional intent that child custody decisions be made in the state best able to determine the best interest of the child. See Pub.L.No. 96-611, section 7, 94 State. 3568.

Id. at 877. Ultimately, the court held that by declining to determine the best interests of the child, Ohio enabled the New Jersey courts to modify the initial custody determination from Ohio without violating the full faith and credit clause or federal and state statutes, including the UCCJA. Id. at 880.

The Supreme Court of Appeals of West Virginia reached a similar result in Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986). In that case, adoption proceedings that were initiated in Ohio were invalidated. The natural mother then brought a habeas corpus action in West Virginia to secure custody of the child from the prospective adoptive parents living with the child in West Virginia. The West Virginia court held that the judgment from Ohio setting aside the adoption was entitled to full faith and credit. Id. at 105. Nevertheless, the court

held that West Virginia retained jurisdiction to determine custody in light of the child's best interests. Id.; see also In re Baby Girl L., 51 P.3d 544 (Okla. 2002) (rejecting due process claim of out-of-state prospective adoptive parents seeking custody of child but ultimately holding that Oklahoma statutes required court to determine best interests of child after a failed adoption).

The Supreme Court of Michigan held otherwise when confronted with this issue. In re Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993); but see id. at 668 (Levin, J., dissenting).[15] In that case, the court rejected the argument that the judgment of an Iowa court should not be enforced based on the

[15] In DeBoer v. DeBoer, 509 U.S. 938 (1993), the United States Supreme Court denied an application to stay the decision of the Supreme Court of Michigan in In re Clausen. Justices Blackmun and O'Connor dissented, recognizing the fundamental disagreement among various courts dealing with the issue of interstate custody disputes following failed adoptions. 509 U.S. at 938.

fact that it did not conduct a hearing concerning the best interests of the child in making a custody determination after a failed adoption. Id. at 660. The court determined that the UCCJA does not require, as a substantive test, that each jurisdiction apply a best interests of the child standard when making custody determinations. Id. at 661. Rather, the court concluded that "[e]ach state, through legislation and interpretive decisions of its courts, is free to fashion its own substantive law of family relationships within constitutional limitations." Id.

As we stated earlier, the UCCJA embodies the notion that custody decrees entered in one state are entitled to full faith and credit in Colorado. However, because the circuit court failed to determine the best interests of A.J.C., we conclude that Colorado would not be obligated under the UCCJA to give full faith and credit to the circuit

court's order granting custody to Mother. In Department of Social Services v. District Court, 742 P.2d 339 (Colo. 1987), this court concluded that two children who had been found dependent and neglected in Ohio and who were in Colorado in a social services placement had to be returned to Ohio upon the request of the Ohio Department of Social Services, the sending agency. The majority focused on the authority of the sending agency to require return of the children, and did not address a best interests analysis. However, Justices Mullarkey and Rovira specially concurred; citing to E.E.B., they would have permitted Colorado to retain jurisdiction under the UCCJA for purposes of conducting a "best interests" hearing. 742 P.2d at 342-43.

Thus, under the UCCJA - the prevailing law in Missouri -- we conclude that Colorado could properly exercise jurisdiction over the Petitioners'